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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF AMERICAN APPAREL MANUFACTURERS ASSOCIATION, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, AMERICAN IRON AND STEEL INSTITUTE, AND UNITED STATES ASSOCIATION OF IMPORTERS OF TEXTILES AND APPAREL IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Pursuant to Rule 37.2(a) of the Rules of this Court, the American Apparel Manufacturers Association ("AAMA"), the American Association of Exporters and Importers ("AAEI"), the American Iron and Steel Institute ("AISI"), and the United States Association of Importers of Textiles and Apparel ("USA-ITA") (collectively, "the Associations" or "amici"), with the written consent of all parties,[1] respectfully submit this brief amicus curiae in support of the petition by Chrysler Corporation ("Chrysler") for a writ of certiorari to the United States Court of Appeals for the Federal Circuit ("Federal Circuit").

This case involves the proper interpretation of a tariff provision -- subheading 9802.00.80 of the Harmonized Tariff Schedule of The United States ("HTS"), 19 U.S.C. § 1202 -- which provides reduced-duty treatment for eligible imported goods assembled abroad from parts and components fabricated in the United States. If the conditions of 9802.00.80 are satisfied, the dutiable value of the imported article is reduced by the value of the U.S.-made components.

The provision was designed to promote the use of U.S. products as inputs in goods assembled abroad. U.S. manufacturers that engage in production sharing rely upon the provision to benefit from lower-cost assembly labor in order to better compete with labor-intensive articles produced by foreign manufacturers from foreign parts.

The Associations are trade groups whose members are substantially involved in international trade activities in

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[1] All parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk of this Court.

general and in activities concerning imports under the provisions of subheading 9802.00.80 in particular. It is the view of the Associations that their respective members stand to be directly and substantially affected by the Court's decision on this matter.[2] If the Federal Circuit's unduly restrictive interpretation of "operations incidental to the assembly process" is permitted to stand, the effects will be severely adverse and detrimental to the collective and

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[2] Amici are trade associations whose members, collectively, are involved in trade in those products which account for the overwhelming majority of current and historical traffic under subheading 9802.00.80, HTS, or have a direct interest in such trade as materials suppliers. AAEI has over 1,000 members engaged in international trade in virtually every industry segment; many such members utilize a subheading 9802.00.80 program. The AAMA's members account for the production of about two-thirds of apparel manufactured in the United States, and the USA-ITA's members account for a substantial number of importers and retailers of wearing apparel. The members of these textile groups are also substantial utilizers of 9802.00.80; indeed, textiles is one of the principal products to make use of that duty exemption provision (with over $5 billion in U.S. imports for consumption under subheading 9802.00.80 in 1993). U.S. International Trade Commission, Production Sharing: Use Of U.S. Components And Materials In Foreign Assembly Operations, 1990-1993, USITC Pub. 2886 at B-24 (May 1995). Finally, as suppliers of 75 percent of the raw steel produced in the United States, the U.S. members of AISI are integrally involved in the automotive and numerous other heavy industries -- 1993 motor vehicle imports under 9802.00.80 exceeded $25 billion and all 9802.00.80 imports in the machinery and equipment commodity group topped $46.8 billion. Id. at B-26, B-27. The Associations include literally thousands of domestic manufacturers of materials, components and finished goods, and the importers and exporters of such articles, produced through the practices that the provisions of subheading 9802.00.80 are designed to accommodate and influence to the benefit of the domestic work force.

individual competitive positions of the Associations' members.

SUMMARY OF ARGUMENT

At issue in this case are very specific tariff provisions, the demonstrable purpose of which is to provide clear economic benefit to U.S. manufacturers of parts and components which are used abroad to assemble articles subsequently imported into the United States. Such benefits are intended to encourage the use of U.S. products as inputs in goods produced abroad by low-cost assembly labor, so as to preserve and promote higher skilled and more sophisticated domestic manufacturing.

The legislative history and judicial interpretations of these provisions, development of which has spanned decades, define a clear progression toward ease of access to these tariff benefits through steady removal of impediments at odds with the legislative purpose. Moreover, through case law, there had evolved a clear analytical framework, grounded upon the rational balancing of a number of factors relevant to whether an operation is incidental to assembly, within which issues pertaining to the satisfaction of the statutory condition of incidentality could be reliably, fairly and predictably resolved.

In 1992, a divided panel of the Federal Circuit rendered a decision that unexpectedly reversed a lower court's approval of the reduced-duty benefits, which approval had resulted from a sound application of and reliance upon the established evaluative criteria. The case for which certiorari now is sought affords this Court its first opportunity to review the Federal Circuit's current rationale, which represents an extreme and harmful divergence from prior

law. By requiring a determination that an operation be a minor one as a sine qua non of incidentality, and by further unduly emphasizing the single element of cost as determinative of the minor nature of an operation to the exclusion of other pertinent criteria, the Federal Circuit unjustifiably has dispensed with balancing altogether. Finally, by introducing an evaluation of investment in capital equipment, which cost is not relevant, the Federal Circuit's rationale renders the entire incidentality inquiry unsound.

This aspect of the law now has been cast into uncertainty and controversy, even with respect to matters previously long settled. The Federal Circuit's approach stands to adversely affect the economic interests of U.S. labor and the domestic industrial base, and risks direct frustration of the clear congressional intent to aid such parties, including amici's members, in an orderly and beneficial participation in production sharing.

ARGUMENT

THE DECISION BELOW WRONGLY AND MATERIALLY WEAKENS A STATUTORY PROGRAM OF SIGNIFICANT ECONOMIC IMPORTANCE

1. Background

Over the last three decades, the U.S. economy has become increasingly integrated with that of the rest of the world, and U.S. manufacturers, in the face of global economic realities, increasingly have turned toward international production sharing in order to maintain competitiveness. In the course of this evolution toward global integration, the provisions of subheading 9802.00.80,

HTS, and its predecessor provisions,[3] have served U.S. firms well, enabling them to vastly improve the price competitiveness of their products by shifting labor-intensive assembly operations to lower labor cost countries, to reduce the cost of cross-border transfers of both component parts and finished goods, and to rationalize production by consolidating the manufacture of particular components and products in specialized facilities, both foreign and domestic, so as to achieve greater efficiency and economies of scale.[4]

It is well documented that the purpose of the duty-saving provisions of subheading 9802.00.80 is to nurture U.S. interests and promote U.S. employment in manufacturing sectors, while accommodating the inevitable (and efficient) transfer of lesser-skilled assembly work to lower-wage areas offshore. Over a quarter century ago, the (then) U.S. Tariff Commission concluded that a repeal of item 807.00, TSUS, likely would result in a net loss of skilled domestic manufacturing positions because continuing imports

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[3] Prior to implementation of the HTS (effective January 1, 1989), the substantive provisions of subheading 9802.00.80, HTS, were embodied in item 807.00 of the Tariff Schedules of the United States ("TSUS"), 19 U.S.C. § 1202 (the TSUS provisions were stricken by Pub. L. No. 100-418, § 1204(a), 102 Stat. 1107, 1148 (1988). and replaced by the HTS). As noted by the Federal Circuit in the decision below, Chrysler Corp. v. United States, No. 95-1366 at *3 (Fed. Cir., Mar. 22, 1996) (Fed. Cir. BBS), Petition Appendix ("App.") 1-6, App. 5, there are no relevant differences between subheading 9802.00.80, HTS, and item 807.00, TSUS, the tariff provision interpreted in General Motors Corp. v. United States, 976 F.2d 716 (Fed. Cir. 1992), App. 16-31.

[4] See Production Sharing . . . 1990-1993, supra, USITC Pub. 2886 at 1-1 & n.4.

would contain fewer U.S.-produced components as inputs, and that, absent the available duty exemptions, both the balance of trade and domestic employment could be expected to be adversely affected. U.S. Tariff Commission, Economic Factors Affecting The Use Of Items 807.00 and 806.30 Of The Tariff Schedules Of The United States, TC Pub. 339 at 230-33 (Sept. 1970).

So as to encourage the continued use of U.S.-produced inputs in imported articles and to maintain the usefulness of these statutory provisions to firms engaged in domestic and foreign production sharing, Congress repeatedly has amended the provisions of item 807.00/subheading 9802.00.80. The provision of 9802.00.80 at issue here (i.e., that which permits "operations incidental to the assembly process such as cleaning, lubricating and painting") was added in 1965, when the original provisions of item 807.00 were amended to "(1) clarif[y] the type of articles which may be exported for assembly and then reimported; and (2) enlarge[] the class of activities which may be performed abroad without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong., 1st Sess. 34 (1965) (emphasis added).[5]

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[5] As originally enacted in 1963, item 807.00 applied only to U.S. articles exported for assembly "which have not been advanced in value or improved in condition by any means other than by the act of assembly." As explained in a thorough discussion of the legislative history of item 807.00, see generally U.S. International Trade Commission, Production Sharing: U.S. Imports Under Harmonized Tariff Schedule Subheadings 9802.00.60 And 9802.00.80, 1986-1989 -- Summary Report, USITC Pub. 2349 at A-10 to A-12 (Jan. 1991), the original provisions limited the allowable extent of advancement or improvement of the U.S. goods to that which was brought about solely by the act of assembly. See also U.S. Tariff Commission, Tariff

(continued...)

An important part of the legislative enlargement of permissible activities was the express provision for "operations incidental to the assembly process such as cleaning, lubricating and painting." The accompanying House Report explained that:

> It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, paint, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. It may also be necessary to test and adjust the components. Such operations, if of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

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[5](...continued)

Classification Study, Explanatory and Background Materials: Schedule 8. -- Special Classification Provisions, Appendix to the Tariff Schedules at 15 (Nov. 15, 1960) (this same restriction appeared in explanatory notes regarding the provisions of item 807.00 as originally proposed). It should be kept in mind, of course, that, under item 807.00/subheading 9802.00.80, it is only the value of the U.S. component, as it is exported from the United States, that is excluded from the dutiable value of the finished article.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965). The passing reference in this quotation to operations "of a minor nature," which did not find its way into the statute, is the sole underpinning of the Federal Circuit's rationale at issue here. Moreover, when item 807.00 was again amended, by the same Congress sitting in second session, there was no suggestion that the incidental operations specifically approved by statute were limited by any ambiguous notions regarding the "minor nature" of such operations:

> In the Tariff Schedules Technical Amendments Act of 1965 item 807.00 was clarified to make it clear that cleaning, lubricating, and painting could be performed in connection with the assembly function without subjecting the U.S. components to duty on their return to this country.

Committee on Finance, U.S. Senate, Summary of Minor House-Passed Bills Pending Before the Committee on Finance (1966) at 14, quoted in Production Sharing . . . 1986-1989 -- Summary Report, supra, USITC Pub. 2349 at A-11 to A-12. Furthermore, an "additional restrictive clause" that had been added in 1965 (requiring that there be an intention, at the time of exportation of the U.S. component, to ship the assembled article to the United States) was deleted from item 807.00 in 1966 (see USITC Pub. 2349 at A-11), thereby further promoting the legislative purpose that the duty exemption encourage the use of U.S. goods in foreign assembly operations.

Notwithstanding the clear intent of Congress that these provisions operate to engage and actively assist U.S. parts and components producers in global production sharing, the U.S. Customs Service ("Customs"), steeped in

its traditional role of protecting the revenue, consistently adopted unduly restrictive interpretations of item 807.00 that limited the utility of the provisions. Over the years, reviewing courts regularly and repeatedly had to prod Customs into conformity with the legislative mandate to provide industry with these reduced-duty benefits.

Throughout the 1970s, controversies arose requiring the courts to provide incremental guidance countering Customs' reluctance to extend item 807.00 application to any operation not explicitly encompassed by statute. For example, while the statute provided for cleaning, lubricating and painting (and, clearly, it was permissible "to file off or otherwise remove small amounts of excess material," H.R. Rep. No. 342, supra, at 49), Customs denied item 807.00 benefits where operations involved the cutting of materials. On review, the U.S. Court of Customs and Patent Appeals ("CCPA") -- one of the predecessors to the Federal Circuit -- applied standards of practicality that tempered the agency's conservative and mechanistic approach, and ruled that cutting materials to length did not foreclose use of item 807.00. See General Instrument Corp. v. United States, 462 F.2d 1156 (CCPA 1972) (item 807.00 treatment approved for U.S. wire, exported on spools and used in assembly of transistors, notwithstanding that such wire was cut to length after attachment of the free end to the transistor being assembled). Customs then refused to extend that teaching to encompass materials cut to length and width, but the CCPA required precisely that. General Instrument Corp. v. United States, 480 F.2d 1402 (CCPA 1973) (cutting foil, paper, tape and film to proper length, and the further cutting to width and trimming of the foil, all found to be permissible operations incidental to assembly of a capacitor). Thus required to accept cutting operations, Customs nevertheless balked at various shaping procedures and similar operations; in

response, the court of appeals led Customs, one operation at a time, through an ever more expansive understanding as to the activities permitted under item 807.00. See General Instrument Corp. v. United States, 499 F.2d 1318 (CCPA 1974) (extending item 807.00 treatment to television deflection yokes assembled from U.S. wire that was despooled, formed into a horizontal coil, cement-dipped, dried and shaped, other wire despooled and wound about a core to form a vertical coil, and wire despooled, cut, stripped of insulation and woven into a harness); see also United States v. Texas Instruments, Inc., 545 F.2d 739 (CCPA 1976) (affirming a lower court's decision that the scribing and breaking of silicon slices along predefined "streets" (so as to separate thousands of transistor chips formed on each slice) was a permissible operation in conjunction with the assembly of the individual chips into complete, encapsulated transistors). Moreover, such concepts were held to apply without regard to the scale of the components involved. See Rudolph Miles v. United States, 567 F.2d 979 (CCPA 1978) (cutting of holes and slots in steel "Z-beams" was found permissible in the construction of railroad boxcars).

Then, in 1981, the court of appeals advanced item 807.00 jurisprudence beyond this cumbersome case-by-case and operation-by-operation approach to overruling challenges raised by Customs. In affirming the U.S. Court of International Trade's decision that Customs erroneously had denied item 807.00 treatment on the basis of pocket slitting and buttonholing operations found to be incidental to the assembly of wearing apparel, the appellate court articulated definitive analytical criteria pertinent to any evaluation of incidentality. In United States v. Mast Industries, Inc., 668 F.2d 501 (CCPA 1981), the court concluded that "Congress intended a balancing of all relevant factors to ascertain

whether an operation of a 'minor nature' is incidental to the assembly process" (688 F.2d at 506), and declared that relevant factors to be considered in such a balancing include: (1) the cost and time of the disputed operation relative to the cost of the affected component and the time required for assembly of the whole article; (2) whether the operations in question were necessary to the assembly process; (3) whether the operations were so related to assembly as to be logically performed during assembly; and (4) whether economic or other practical considerations dictate performance of the operations at the time of assembly. Id. at 506 & n.7. See also United States v. Oxford Industries, Inc., 668 F.2d 507, 511 n.11 (CCPA 1981) (in this companion case to Mast, the court noted, in particular, that cost is only one factor to be considered).

Mast, with its eminently reasonable "balancing" approach to incidentality, ran contrary to an existing Customs regulation, promulgated in 1975, that attempted to apply a bright-line test to incidentality.[6] Eventually, when Customs decided that certain top-coat painting operations performed in conjunction with automotive vehicle assembly should preclude preferential tariff treatment for the use of

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[6] Customs, by regulation, provided examples of what, in its view, constituted operations incidental to assembly (including cleaning, the removal of rust, grease, paint or other preservative coating, the application of "preservative" paint or other coating, including a metallic coating or a protective encapsulation), and those not incidental to assembly (including melting of ingots, molding cast metal, cutting parts to pattern, "painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics," chemical, mechanical or other treatments of metal or other materials which impart significant new characteristics or qualities). 19 C.F.R. §§ 10.16(b), 10.16(c) (1995).

U.S.-made auto body components, these two views collided. As a result, in General Motors Corp. v. United States, 770 F. Supp. 641, 646-47, (Ct. Int'l Trade 1991), App. 32-47, 42-46, rev'd, 976 F.2d 716 (Fed. Cir. 1992), App. 16-25, the Court of International Trade found no support in the statute or in prior case law (including Mast) for the bright-line view, as expressed in the regulation, that permissible painting is limited exclusively to preservative (rather than decorative) painting. Rather, the trial court found that application of the Mast criteria (including whether the operation is most logically performed during assembly) weighed convincingly in favor of considering the top-coating to be incidental to assembly. 770 F. Supp. at 646, App. 42.

With the Federal Circuit's split decision reversing the lower court (not on the grounds that bright lines should prevail over balancing but that, from a contorted, cost-only view, the painting at issue was not "minor"), General Motors, 976 F.2d 716, App. 16-31, the state of the law as it applies to this issue was placed, and continues to be left, in turmoil.

2. The Decision Below Is Aberrational And Mischievous: By Failing To Require A Balancing Of Traditional Factors, The Court Of Appeals Has Opened The Door To Frustrating The Congressional Will; By Focusing Exclusively On Cost, And Especially Capital Cost, It Has Unsettled That Which Had Never Been Nor Should Ever Have Been In Doubt.

General Motors addressed the same provision of law as that in question here: a duty exemption applies to U.S. fabricated components that have not been advanced in value or improved in condition except by assembly or by opera-

tions incidental to assembly, such as cleaning, lubricating and painting. Moreover, the facts of General Motors are virtually indistinguishable from those at hand: steel auto body parts, produced in the United States, were exported to Mexico for assembly, and were subjected to protective primer paint and top-coat color painting in the course of assembly. In that case, Customs, under its regulation that draws a distinction between protective and decorative painting, disallowed beneficial tariff treatment solely on the basis of the application of an appearance-enhancing top coat. The Court of International Trade found the regulatory distinction between protective and decorative painting to be without support and, applying the principles of Mast and Oxford, determined the painting at issue in General Motors to be incidental to assembly. The government appealed that decision and, in an extreme departure from Mast (wherein the relevant inquiry was posed as whether an operation of a minor nature was indeed incidental), a divided panel of the Federal Circuit held, without even considering the regulation, that permissible non-assembly operations must be "minor" as well as "incidental". As a result of this misdirected focus, and solely on the basis of the single factor of relative cost (with respect to which the majority ventured far beyond previously accepted techniques and applied an unprecedented and inapposite analysis involving allocations of investment in non-assembly capital equipment), two Federal Circuit judges determined that the paint operation precluded the application of item 807.00 to top-coated auto body components.

In a carefully reasoned dissent in General Motors, the Chief Judge roundly criticized the majority's unwarranted resort to and subsequent misreading of legislative history, which approach led the majority to interject "minor" as a determinative qualifier for non-assembly operations in

addition to the sole statutory requirement that a non-assembly operation be "incidental" thereto. The Chief Judge then applied a comprehensive Mast-type analysis to demonstrate that a true balancing of all relevant criteria dictated a finding of incidentality with respect to the operation that Customs challenged, General Motors, 976 F.2d 716, 721-23 (Nies, C.J., dissenting), App. 26-31. Moreover, in dismissing as "ludicrous" a government suggestion as to how the operation in dispute might have been performed other than in connection with assembly, Judge Nies further expressed the view that the government's appeal was "frivolous" (id. at 722, App. 30). Nonetheless, the government prevailed. The Federal Circuit denied General Motors Corporation's petition for rehearing, and declined General Motors Corporation's suggestion for rehearing in banc. General Motors Corporation did not thereafter petition this Court for a writ of certiorari.

Now, the very same issue arises with Chrysler's claims under the very same provisions (in subheading 9802.00.80, HTS). Here, on the force of the General Motors decision, Customs denied 9802.00.80 treatment for Chrysler's steel auto body parts which also were produced in the United States, were exported to Mexico for assembly, and were subjected to primer and top-coat painting in the course of assembly. Chrysler challenged Customs' action in the Court of International Trade and, constrained and bound by the General Motors precedent, that court upheld Customs' denial of subheading 9802.00.80 benefits.

Nonetheless, the trial court clearly articulated dissatisfaction with the implications of the Federal Circuit's holding in General Motors, recognizing that the Federal Circuit had imposed restrictions that reached even beyond the extremes of Customs' bright-line test. (Under the

reasoning of the General Motors majority, even if the overall purpose of painting is preservative, it still would not be allowable if it were not also a "minor" operation under the cost comparison analysis expounded in that decision.) In addition, the trial court candidly endorsed and embraced the dissent in General Motors, describing the practical appeal of considering whether a disputed operation is an integral part of assembly. Finally, it noted that the plain terms of the statute support an allowance in this case and that "Congress may have intended to draw a clearer line than the courts are recognizing." Chrysler Corp. v. United States, Slip Op. 95-39 at 7 (Ct. Int'l Trade Mar. 14, 1995), App. 7-14, 13.

When Chrysler appealed the result dictated by General Motors, a Federal Circuit panel that included the judge who authored the majority opinion in General Motors merely reiterated the determination in that decision (i.e., that an operation must be "minor" in order to be "incidental"), and noted that controlling precedent had correctly been applied below. In its Chrysler Corp. opinion however, the Federal Circuit also took pains to note that, under the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned in banc, the appellate court's decision in this case also was controlled by General Motors.

Therefore, in seeking this Court's review, the petition does not represent an assault on legions of cases that pronounce well-settled principles of customs law. Chrysler Corp. presents an issue of exceptional and expansive economic importance, and it is an issue that represents an extreme departure from the course of case law that, until recently, guided Customs' administration of this important tariff provision in a consistent direction that gave practical effect to a statute crafted to keep an American industrial base

engaged in production sharing. Moreover, and beyond the fact that the Federal Circuit's position is in conflict with the clear purpose of the statute, even under a requirement that an operation "incidental" to assembly must be "minor" as well, the Federal Circuit has failed to consider in the proper light and to accord due respect to the very factors that it has articulated as relevant to such a determination. That is, the majority's unusual and unidimensional approach to the evaluation of costs in General Motors (which was perpetuated in this case) departs from prior precedent by failing to balance various considerations relevant to an inquiry as to incidentality, and introduces a new and demonstrably irrelevant consideration (i.e., capital investment) that complicates administration, reduces predictability, and potentially leads to anomalous results.

The current approach of the Federal Circuit, which calls for evaluation of all non-assembly operations in the aggregate (rather than examination only of a disputed top-coating operation), and places novel emphasis upon accounting for depreciation of capital investments, represents an analytical environment where the forest is obscured by the trees. While paying homage to the Mast balancing test, the Federal Circuit has adopted an approach that reflects the absence of any balancing. Notwithstanding that the General Motors majority acknowledged satisfaction of at least three of the Mast indicia of incidentality, the court then focused narrowly on cost, to the virtual exclusion of all other factors. Such elevation of and emphasis upon a single criterion, particularly involving a one-sided view of cost, simply cannot be condoned. See Oxford Industries, supra, 668 F.2d at 511 n.11 ("Cost, of course, is only one factor to be considered when making an 807(c) [i.e., incidentality] determination.").

Finally, and most disturbing, is the Federal Circuit's introduction of an approach that attempts to account for capital costs. Nowhere in Mast (or Oxford) is there any suggestion that depreciation of machines used in non-assembly work should be considered at all,[7] nor would it make any sense to do so. Plainly, for manufacturers to consider utilization of subheading 9802.00.80 in the first place, the driving consideration necessarily must be labor costs; mechanized operations will occasion similar costs regardless of the site of investment, but if it is necessary to perform the automated operation in conjunction with assembly (i.e., if the operation is incidental to assembly), such capital investment logically and necessarily will be drawn to the location of the low cost labor pool. In other words, investment in automated operations must be expected to follow the cost-advantageous assembly labor pool, simply because such operations are incidental to assembly. Where such investment clearly is driven by the potential of subheading 9802.00.80 benefits, it makes no sense to preclude those benefits on the basis of such investment.

By injecting capital equipment depreciation into the "incidental" (or even "minor") equation, the Federal Circuit has opened an analytical Pandora's Box. Such equipment may well be American-made and even American-owned (and leased to a related assembler abroad). Should the location of the company books upon which such equipment is carried

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[7] The Mast trial court (quoted at 668 F.2d 503) found that "the fact that these [challenged] operations were accomplished by machines is of no moment in the overall assessment of their significance." In Oxford, the appellate court noted that the disputed operation "is one of the cheapest, fastest, and most automatic operations concomitant with the assembly process" (668 F.2d at 510), but expressed no concern over the investment in the machines used.

determine the incidentality of the operations performed? Should the replacement of an aging machine with a new (higher-cost) model change the character of an operation from incidental to impermissible simply because it is performed more reliably and with fewer disruptions for repairs? To say the least, the Federal Circuit's new analysis makes it improbable that the results intended by Congress will be achieved.[8]

The Federal Circuit has reversed the entire historical thrust of the provisions of subheading 9802.00.80, and the core purpose of the statute stands to be frustrated. The result is only too predictable. Because of the denial of the duty deduction here, other U.S. fabrication industries will likely be imperiled. As Judge Nies opined: "This cannot be the intent of Congress." General Motors, 976 F.2d at 723, App. 31 (Nies, C.J., dissenting).

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[8] Nor is such mischief confined to the case of an automobile assembler's equipment for top-coat painting; it affects every operation set forth in the statute (e.g., machines for injecting lubricants into any assembly with moving parts; washers or conveyors for transporting parts through baths of solvents; equipment used to apply or remove coatings; and, of course, all forms of equipment needed for the safe use and sound disposal of hazardous materials used in or generated by such operations). Indeed, there is no operation among those already viewed by Customs as incidental to assembly that is not commonly performed by machine. See 19 C.F.R. § 10.16(b) (trimming or removing excess material may be done by complex machine tools; cutting to length may involve high precision and highly automated devices; and calibration and testing may require the most sophisticated of electronic instruments).

CONCLUSION

Perhaps because customs controversies are decided by lower courts having national jurisdiction, this Court has not reviewed a customs case since 1966, when it granted certiorari and summarily reversed a decision of the CCPA. United States v. Clayton Chemical & Packaging Co., 383 U.S. 821 (1966). Here, although there is an absence of a conflict between the Circuits, a divided judiciary below has needlessly left an important legislative program governing scores of billions of dollars of annual imports in a shambles. As the trial judge in this case lamented before bowing, as required, to precedent (Chrysler Corp., Slip Op. at 8-9; App. 14):

> Judge Nies, in dissent in General Motors, indicated that if a painting operation must be done as an integral part of the assembly process, it is incidental to assembly and the affected components are not dutiable. 976 F.2d at 722-23. This is an appealing interpretation of the statute . . . , but it is not the current law.

She is, of course, correct: "[I]t is not the current law;" but it should be. The petition should be granted.

Respectfully submitted,

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